

2009

While It May Be True that the King Can Do No Wrong, What about His Offspring: The Labyrinthine Law of Arm - of - the - State Immunity Examined through the Prism of Port Authorities

Taylor Simpson-Wood

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>

 Part of the [International Law Commons](#)

Recommended Citation

Simpson-Wood, Taylor (2009) "While It May Be True that the King Can Do No Wrong, What about His Offspring: The Labyrinthine Law of Arm - of - the - State Immunity Examined through the Prism of Port Authorities," *South Carolina Journal of International Law and Business*: Vol. 5 : Iss. 2 , Article 4.

Available at: <https://scholarcommons.sc.edu/scjilb/vol5/iss2/4>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

WHILE IT MAY BE TRUE THAT “THE KING CAN DO NO WRONG,” WHAT ABOUT HIS OFFSPRING?: THE LABYRINTHINE LAW OF ARM – OF – THE – STATE IMMUNITY EXAMINED THROUGH THE PRISM OF PORT AUTHORITIES

*Taylor Simpson-Wood**

I. INTRODUCTION

One of the most frequent questions I am asked by the students in my Admiralty class is why I chose to specialize in the area of Maritime Law while I was in law school and upon graduation. My answer is simple: because of its eclectic nature. In addition to its own unique general maritime law legal concepts, such as General Average¹, Limitation of Liability,² and the Personification of the Vessel Theory,³

* Associate Professor of Law, Barry University School of Law; B.F.A., The Theatre School at DePaul University; J.D., Tulane Law School; LL.M. Admiralty, Tulane Law School. Professor Simpson-Wood currently teaches in the areas of Admiralty & Maritime Law, Civil Procedure, Conflict of Laws, and Popular Culture & the Law.

¹ The concept of General Average concerns situations where an extraordinary sacrifice is made or expense incurred by one party to avoid a peril that threatens an entire maritime venture. As a result, the party incurring the loss or expenditure has conferred a benefit upon the other parties and has the right to claim contribution from all who participated in the maritime adventure so that all share proportionately in the loss. *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F. Supp. 884, 891 (D. Md. 1967). The underlying principle of the doctrine was set forth by the Supreme Court in 1870:

Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expense so incurred shall be assessed upon all in proportion to the share of each in the adventure.

The Star of Hope, 76 U.S. 203, 228 (1870).

² The Limitation of Liability Act is found at 46 U.S.C. §§ 30501-30512 (2006). Pursuant to §30505, a vessel owner is permitted to limit his or her

Maritime Law allows one to study and to practice in basically all other major areas of civil law. If Civil Procedure is your game, Admiralty has its own special rules,⁴ including its own provision for subject matter jurisdiction.⁵ If torts is your preferred area, there are a plethora of options. Starting with the general maritime law rule that "the owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case,"⁶ a number of specialized bodies of tort law can also be discovered covering such areas as collision,⁷ injuries to seamen,⁸ or to maritime

liability for any claims, debts or losses "arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture" to the "value of the vessel and pending freight" as long as the claim, debt, or loss was "done, occasioned, or incurred, without the privity or knowledge of the owner."

³ The Personification Theory is "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment. . . . [A] purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached" *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960). Of key importance is the fact that the Personification Theory permits the holder of a maritime lien to sue the vessel *in rem* and allows the vessel to be sold "under the hammer" free and clear of all liens. For a more detailed discussion of this area see Martin J. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337 (2000).

⁴ See, e.g., Fed. R. Civ. P. 9(h), Fed. R. Civ. P. 14(c), Fed. R. Civ. P. Supp. R. A-G (2006). See also Fed. R. Civ. P. 82 which provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of the federal venue statutes. The result is that for the venue will properly lie "in any district where the parties are subject to personal jurisdiction and can be served with process" for cases qualifying as maritime under Rule 9(h). *I & M Rail Link v. Northstar Navigation*, 21 F. Supp. 849, 857 (N.D. Ill. 1998).

⁵ Federal district courts have original jurisdiction, exclusive of the state courts over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (2006).

⁶ *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

⁷ See, e.g., *The Pennsylvania*, 86 U.S. 125, 136 (1874) (setting forth the *Pennsylvania* Rule which establishes that when a ship at the time of a collision is in actual violation of a statutory rule or regulation intended to prevent collisions, "the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." See also *The Oregon*, 158 U.S. 186 (1895) (establishing the presumption that a moving vessel that strikes a stationary

workers who do not qualify as seamen.⁹ If you thrive on Contracts, the ins and outs of Charter Parties¹⁰ could fascinate for years to come.

object is negligent); *The Louisiana*, 70 U.S. 164 (1865) (creating the presumption that a vessel which drifts into a stationary object is at fault).

⁸ See *The Jones Act* (Merchant Marine Act of 1920), 46 U.S.C. § 30104 (2006). On February 6, 1920, Senator Wesley L. Jones of Washington, Chairman of the Senate Committee on Commerce, introduced the provisions of the Act addressing seamen's remedies as the final section of S. Res. 3876, 66th Cong., 2d Sess. § 3 (1920); see Kenneth G. Engerrand & Jeffry R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L. J. 431, 438, n. 56, 60 (1983). Attaining Jones Act seaman status permits seamen to sue for injuries resulting from the negligence of their employers. It is also the trigger for recovery under the general maritime law remedies of maintenance and cure and unseaworthiness. See Jack L. Allbritton, *Seaman Status in Wilanders's Wake*, 68 TUL. L. REV. 373, 374 (1994) (citing Martin J. Norris, *THE LAW OF SEAMEN* section 27:1, at 191-193 (4th ed. 1985); David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. MAR. L. & COM. 547 (2003) (noting that the combination of these three remedies result in seamen being viewed as the "most generously-treated personal injury victims in American law.")

Prior to the enactment of the Jones Act, a seaman was not entitled to bring an action for negligence against his employer due to the fellow servant doctrine. Rather, an injured seaman was limited to the traditional maritime remedies of wages, maintenance and cure, and an action for unseaworthiness against the vessel. *The Osceola*, 189 U.S. 158, 175 (1903)

⁹ See *The Longshore and Harbor Workers' Compensation Act* ("LHWCA") 33 U.S.C. §§ 901-950 (2006). The LHWCA is the compensation scheme ultimately devised by Congress to provide protection for shore-based maritime workers. The LHWCA provides compensation remedies to maritime employees for disability or death resulting from injuries occurring on navigable waters. At the time of its enactment, its purpose was to place maritime workers, other than the master and crew members who solely fell within Jones Act coverage, on the same footing as land-based workers entitled to state worker's compensation benefits. The LHWCA was eventually enacted after prior Congressional attempts to extend state compensation benefits to maritime workers had been repeatedly thwarted by the Supreme Court. See Engerrand & Bale, *supra* note 7 at 441-445 for an excellent discussion of this process.

In 1972, Congress provided maritime workers who were not masters or members of the crew with a 905(b) action, which provides for actions against the vessel as a third party for injuries caused by vessel negligence. 33 U.S.C. § 905(b) (2006) ("In the event of injury to a person covered under this Act by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party")

¹⁰ "A charter party is 'a specialized form of contract for the hire of an entire ship, specified by name.' [A] time charter provides for the charterer to

For those who gravitate toward Property law, delving into the unique aspects of the Laws of Finds and Salvage¹¹ should have its rewards.

The inclusive nature of Maritime Law was once again in evidence as I began my search for a topic for this symposium. I decided to review cases decided during 2008 which exemplified the intersection between maritime law, ports, and arbitration. Despite these limited

obtain the vessel for a fixed period of time, and under a voyage charter, the charterer obtains the vessel for the length of the voyage.” Keytrade UDA, Inc. v. Ain Temouchment M/V, 404 F.3d 891, 892, n.1 (5th Cir. 2005) (quoting THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 11-1 (4th ed. 2001)). Under both the time and voyage charter, while the charterer obtains the use of the ship, the owner continues to operate the vessel. DAVID W. ROBERTSON, STEVEN F. FRIEDEL, MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES, 334-338 (2d ed. 2008). In contrast, there stands the bareboat or demise charter. Under the demise or bareboat charter, complete control of the vessel is given to the charterer for a set period of time. The vessel is manned with a master and crew selected by the charterer and she “makes his voyages and carries the cargo he chooses It has long been recognized in the of law admiralty that for many, if not most, purposes, the bareboat charterer is to be treated as the owner, generally called the owner *pro hac vice*.” Reed v. The Yaka, 373 U.S. 410, 412 (1963). In recent years an additional type of charter has gained in popularity known as the “slot” or “space” charter. Such a charter permits the charter of less than the entire ship. For example, a charterer might “obtain a specific number of ‘slots’ on a container vessel. See Robertson, Friedell, and Sturley, *supra* note 4 at 339. The freight or the amount due for carrying the specific cargo would be based on “the capacity booked per voyage” or “on the capacity actually used on a time basis.” *Id.*

¹¹ “Historically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their owners. Under this law, the original owners still retain their ownership interests in the property, although the salvors are entitled to a very liberal salvage award.” Columbus-America Discovery Group v. Atl. Mut. Ins. Co., 974 F.2d 450, 459 (4th Cir. 1992). The Blackwall, 77 U.S. 1(1869) (setting forth the six traditional factors on which a salvage award is based). “A related legal doctrine is the common law of finds, which expresses the ancient and honorable principle of ‘finders, keepers’ Traditionally, the law of finds was applied only to maritime property which had never been owned by anybody, such as ambergris, whales, and fish. A relatively recent trend in the law, though, has seen the law of finds applied to lost and abandoned shipwrecks.” *Id.* at 459-460; see also R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006) (holding that a salvor-in-possession of an historic wreck could not convert its status to that of a finder); Sea Services of the Keys, Inc. v. The Abandoned 20-foot Midnight Express Vessel, 16 F. Supp. 2d 1369 (S.D. Fla. 1998) (law of finds applicable where vessel rescued had been abandoned after being used in criminal activity).

parameters, the opinions I found satisfying my criteria ran the gamut. They included cases concerning the issue of whether admiralty subject matter jurisdiction could be properly asserted over arbitration defense costs arising out of a charter party dispute¹² or over a contract for the sale of a vessel,¹³ to those focusing on the question of whether arbitration should be compelled where the vessel owner was a non-signatory to the arbitration agreement but the vessel was being sued *in rem*¹⁴ or in Jones Act claim situations,¹⁵ from a decision analyzing what

¹² *Naias Marine, S.A. v. Trans Pac. Carriers Co. Ltd.*, 2008 WL 111003 (S.D.N.Y.), 2008 A.M.C. 92 (finding no admiralty subject matter jurisdiction where plaintiff sought recovery of arbitration defense costs arising out of the parties' arbitration agreement contained in the charter party).

¹³ *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co., Ltd.*, 2008 WL 4489790 (S.D.N.Y.) In *Kalafrana*, the court held that in light of *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14 (2004) and *Folksamerica Reinsurance Co. v. Clean Water of N.Y.*, 413 F.3d 307 (2d Cir. 2005), the long standing rule in the Second Circuit that contracts for the sale of a vessel are not maritime was no longer viable. *Id.* at *3. "As the Court noted in *Kirby*, whether a contract falls within admiralty jurisdiction depends on 'the nature and character of the contract.'" *Id.* (citing *Kirby*, 543 U.S. at 24). Examining the agreement at issue in *Kalafrana*, the district court found it was "a contract for the purchase of a launched ship that had been plying the seas for some time. As such it has a distinctly 'salty flavor,' for the sole purpose of a ship is to sail." Thus, it was a maritime contract and within federal admiralty jurisdiction. *Id.*

The court hedged its bets by noting that even if *Kirby* and *Folksamerica* were read as being limited to cases involving "mixed contracts, there was still admiralty jurisdiction over the agreement in the case." *Id.* at *4. The contract was not only for the sale of the vessel, but also for necessary repairs. As such, it was a mixed contract comparable to those at issue in *Kirby* and *Folksamerica*. *Id.* The contract "cannot be excluded from admiralty jurisdiction simply because the disputes [under the contract] involve, in part, the sale of a vessel." *Id.* Whether mixed contracts falls "within admiralty jurisdiction depends on whether they make 'reference to maritime service or maritime transactions.'" *Id.* (quoting *Kirby*, 543 U.S. at 24 (citations omitted)). It does not depend "on whether the non-maritime components are properly characterized as 'incidental' to the contract." *Id.* (quoting *Folksamerica*, 413 F.3d at 15 (citations omitted)). "[A]dmiralty jurisdiction would undoubtedly exist if *Kalafrana* had entered into a vessel repair contract alone." *Id.* (citing *Flota Maritime Browning de Cuba, Sociedad Anonima v. Snobl*, 363 F.2d 733, 736 (4th Cir. 1966)). The court could find "no intuitive reason why the same repairs . . . fail to do so if undertaken on a sales agreement." *Id.* (quoting *Gaster Marine v. M/V The Restless*, 33 F. Supp. 2d at 1335). Therefore, the contract in *Kalafrana* was maritime. *Id.*

¹⁴ *The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.*, 523 F.3d 528 (5th Cir. 2008) (refusing to enforce an arbitration clause in a voyage charter

against a vessel owner where the vessel owner who had time chartered the vessel was not a party to the later voyage charter entered into by the time charterer/disponent owner and the shipper even if the terms of the voyage charter had been incorporated into the bill of lading and even though the vessel was sued *in rem*. "A Bill of Lading is a 'document which is signed by the carrier or his agent acknowledging that goods have been shipped on board a specific vessel that is bound for a particular destination and stating the terms on which the goods are to be carried.'" *Id.* at 531, n.1 (citing *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1462, n.12 (11th Cir. 1998) (quoting THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAWS § 10-11 at 44 (2nd ed. 1994))).

¹⁵ During 2008, two interesting cases arose in this area, one concerning international arbitration and the United Nations Conventions on Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. §§ 202-208 (2002), and the other, the "ward of the court doctrine and the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16 (2002).

In *Vavaru v. Royal Caribbean Cruises, Ltd.*, 2008 WL 649178 (S.D. Fla.), plaintiff allegedly sustained a back injury during his term of employment as a waiter on the defendant's ship. *Id.* at *2. The employment relationship was governed by a Sign-On Employment Agreement ("SOEA"). *Id.* The SOEA incorporated and made part of the employment agreement the Collective Bargaining Agreement ("CBA") between the defendant employer and the Norwegian Seafarers' Union (the "Union"). *Id.* The plaintiff was provided with a copy of the CBA at the time of executing the SOEA. *Id.* The CBA provided in relevant part that if grievances could not be decided by the Master, then they should be resolved by the Union. *Id.* at *3. If that failed, all grievances "shall be referred to and resolved exclusively by binding arbitration pursuant to" the Convention. *Id.* The cause before the *Vavaru* court was whether to compel foreign arbitration in the Bahamas. *Id.* at *1. The plaintiff argued that there was "a potential disparity between the Union's interest and [his] interests with respect to the prosecution of Plaintiff's rights under the Jones Act." *Id.* at *5 (citing *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525 (11th Cir. 1997)). After reviewing the distinctions made by two Supreme Court decisions, *Alexander v. Gardener-Denver Co.*, 415 U.S. 36 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the court ruled that "because the SOEA incorporated by reference the CBA containing the arbitration agreement . . . and Plaintiff was provided with a copy of the CBA . . . the arbitration agreement at issue in this case is, like the agreement in *Gilmer*, an individual contractual agreement to submit to arbitration rather than a mere collective bargaining agreement not to do so, as in *Alexander*." *Id.* at *6. In compelling arbitration, the court specifically noted that the plaintiff "has not demonstrated that Congress intended to preclude waiver of a judicial forum for Jones Act claims." *Id.* at *6, n.14 (citing *Brisentine v. Stone and Weber Engineering Corp.*, 117 F.3d, 519, 523 (citing the *Gilmer* Court's holding that "because the would-be-plaintiff in that case had 'made the bargain to arbitrate,' the burden was on him 'to show that Congress had intended to preclude a waiver of a judicial forum for ADEA claims.'")).

constituted "exhaustion" under a Longshore Workers collective bargaining agreement,¹⁶ to opinions determining whether property was

Barbieri v. K-Sea Transp. Corp., 566 F. Supp. 2d 187 (E.D. N. Y. 2008), concerned a seaman seeking damages for lower back injuries he allegedly sustained while he was working on a petroleum barge. The court conducted a bench trial and found that after he was injured, the plaintiff had signed "an agreement to arbitrate all claims arising out of his injuries" in order to receive "two-thirds of his average net weekly wage as an advance against settlement" in addition to the \$15 per day maintenance payment he had been receiving from his employer as required by the collective bargaining agreement in effect between the employer and the seaman's union. *Id.* at 189. At the time he signed the agreement to arbitrate, the seaman was informed that "he was under no duty to accept this offer and that he would continue to receive the \$15 per day minimum maintenance payment as well as cure regardless of whether he signed the agreement." *Id.* He was also informed that the signed document "would be a legally enforceable contract." *Id.* Plaintiff "acknowledged at the time that he realized that he had a right to sue in court to recover damages and that if he signed the agreement he would be giving up his right to sue in court and be limited to arbitrate his damage claims." *Id.* The plaintiff also testified that none of his "discussions" with his employer "leading up to his decision" to sign the arbitration agreement "came at a time when he was otherwise vulnerable or extraordinarily susceptible to pressure." *Id.*

At trial, the court found most of the plaintiff's arguments as to why the agreement was unenforceable to be "insubstantial" *Id.* at 194. As an initial matter, however, plaintiff did argue that the "ward of the admiralty" doctrine should shift the normal burden of proof from the party challenging an agreement to arbitrate to the party seeking to enforce the agreement. *Id.* at 191-192. Under the ward of the admiralty doctrine, "the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights." *Id.* at 191 (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942)). Plaintiff contended that the court should analyze the enforceability of the [Claims Arbitration] Agreement as it is required to do by the Federal Arbitration Act . . . through the prism of the "wards of the admiralty framework." *Id.* In other words, according to the plaintiff, the contract at issue would be invalid unless it is shown to be fair to the seaman and untainted by deception, duress or any other factor that might bar its enforcement in equity. *Id.* In rejecting plaintiff's argument, the court distinguished *Garrett*, which concerned the release of a claim not an agreement to arbitrate, and noted that "arbitration is not a penalty." *Id.* at 192. Rather, "[t]he availability of arbitration only expands the avenues of redress open to the 'ward of the admiralty.'" *Id.*

¹⁶ *Ayala v. Pac. Mar. Assoc.*, 2008 WL 1886021 (N.D. Cal.). In *Ayala*, the plaintiffs were registered longshoremen working at the port of San Francisco-Oakland who desired to transfer pursuant to their labor contract to the port of Los Angeles-Long Beach. *Id.* at *1. They alleged that their transfer

properly attached pursuant to Rule B where an action has been brought against port agents who allegedly issued without proper authority bills of lading¹⁷ marked "freight prepaid."¹⁸

was being blocked by the Pacific Maritime Association and by the International Longshore and Warehouse Union (ILWU) and their local branch of the ILWU, "in violation of their right to equal treatment under deferral labor laws and in breach of the collective bargaining agreement." *Id.* The defendants moved to dismiss the case, arguing, *inter alia*, that plaintiffs had failed to exhaust the grievance procedures set out in the collective bargaining agreement. *Id.* at *7. They further suggested immediate arbitration as an option, arguing that "under the unique circumstances . . . all parties would be best served by having plaintiffs' transfer grievance promptly submitted to" arbitration "for a final and binding ruling." *Id.* The court found "no cogent rationale . . . for having the Plaintiffs leapfrog to the final stage of the grievance procedure [arbitration of disputes arising under a collective bargaining agreement] as consolation for the fact their earlier efforts to exhaust were ignored." *Id.* Rather, the court held that the plaintiffs had adequately exhausted the grievance procedures and denied defendants' motion to dismiss and to compel exhaustion. *Id.* at *8.

¹⁷ A bill of lading is "a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." BLACK'S LAW DICTIONARY 159 (7th ed. 1999).

¹⁸ Not surprisingly, because New York City is the center of the financial world, the District Court for the Southern District of New York handles a number of Rule B attachment cases. See Greg Morcroft & Robert Schroeder, MarketWatch (Jan. 22, 2007), *New York as Financial Center Seen Threatened* ("The United States needs to reshape its accounting, legal and regulatory structure if New York city is to remain the world's preeminent financial center . . .") available at <http://www.marketwatch.com/news/story/new-york-financial-center-seen/story.aspx?guid=%7B5962CC23> (last visited Feb. 5, 2009). In the Southern District, a typical Rule B attachment scenario might go as follows:

Foreign corporations enter into a maritime contract of charter party which provides for arbitration of any disputes in London. Disputes arise. The party asserting claims against the other initiates arbitration in London. The parties instruct solicitors. In order to obtain security for an anticipated (or at least hoped for) arbitration award, the solicitors for the claiming party instruct counsel in this district to file a complaint in admiralty with this [c]ourt against the other party and obtain from the [c]ourt a writ of maritime attachment under Rule B. The writ is conditioned upon the claim being maritime in nature and the plaintiff's inability to find the defendant within the district for service of process. If those conditions appear from the initial pleadings, a Judge of this[c]ourt issues the writ. The writ of maritime attachment extends to all property of the defendant that may be found within the district, including

The case which really caught my interest, however, was *Puerto Rico Ports Authority v. Carnival Corporation*.¹⁹ This on-going litigation concerns the Puerto Rico Ports Authority (PRPA) and its claim of sovereign immunity.²⁰ Whether this claim of immunity from

electronic fund transfers taking place between banks. It is customary for counsel for such a plaintiff to cause process of attachment to be served upon a number of New York City banks.

Pagane Mar., Ltd. v. Glingrow Holding, Ltd, 2008 WL 276489 (S.D. N.Y.) (citing *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002)). Two cases were decided during 2008, however, which departed from this typical scenario by involving claims not between parties to a charter agreement, but between a charterer and a port or shipping agents. In *Padre Shipping, Inc. v. Yong He Shipping*, 553 F. Supp.2d 328 (S.D. N.Y. 2008), the court ruled that a Liberian vessel owner had a valid prima facie admiralty claim against a Chinese port agent for its alleged violation of an authorization letter due to its issuance without proper authority of bills of lading marked “freight pre-paid”. *Id.* at 332-333. The court reiterated that “[u]nder the law of this circuit, EFTs [electronic funds transfers] to or from a party are attachable by a court as they pass through banks located in that court’s jurisdiction.” *Id.* at 334 (quoting *AquaStoli Shipping, Ltd. v. Gardner Smith Pty, Ltd.*, 460 F.3d 434, 436 (2d Cir. 2006) (citing *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002))). Despite the port agent’s argument that the EFTs at issue represented the funds of other clients, the court found that “the funds wired to and from [the port agent’s] bank account constitute[d]” the port agent’s “property” and consequently were subject to maritime attachment under Rule B. *Id.* at 334-35. In a factually analogous case, *Navision Shipping A/S v. Yong He Shipping (HK), Ltd.*, 570 F. Supp.2d 527 (S.D. N. Y. 2008), the court also upheld its issuance of maritime attachment to a shipping company against a shipping company based in China finding that “[a]s maritime agreements often include restrictions on the issuance of bills of lading for the purpose of preserving a party’s right to exercise cargo liens, a port agent who issues bills of lading marked prepaid when it has been expressly instructed not to do so may very well be breaching its duty to act with reasonable care.” *Id.* at 532 (citing *Padre Shipping, Inc. v. Yong He Shipping*, 553 F. Supp.2d 328, 330 (S.D. N.Y. 2008)).

¹⁹ 2008 WL 4449957 (D. Puerto Rico).

²⁰ *Id.* at *1. The issue of sovereign immunity also arose during 2008 under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, et seq. (2006). In *Ocean Line Holdings, Ltd. v. China National Chartering Corp.*, 2008 WL 4369262 (S.D.N.Y.), the district court had ordered attachment of certain assets of a Chinese charterer due to damages arising from the loss of a vessel. The claim for damages was disputed, and in accordance with the terms of the charter party, the issues would be resolved in arbitration proceedings in London. *Id.* at *1. The Chinese charterer brought a motion to vacate the

suit is recognized will be the key to whether a Petition for Confirmation of an Arbitration Award filed by Carnival is decided by a federal court or whether PRPA's Petition to Vacate the same award as unlawful and contrary to the public policy of the Commonwealth²¹ is resolved before the Puerto Rico Commonwealth Court of First Instance, San Juan Part.²² In addition to the import the ruling in *Carnival* may have on the continued viability of arbitration awards where a port authority is a party to the arbitration agreement, the resolution of the sovereign immunity issue in *Carnival* will require application of the tortious arm-of-the-state doctrine, the current approach for determining when special purpose public corporations, such as a port authority, may claim Eleventh Amendment immunity from suit. The facts of the *Carnival* case provide an excellent opportunity to starkly illustrate the problems which presently exist in this area due to the confusion of the lower courts in how to properly apply the various factors of the elusive test which has been crafted by the Supreme Court.²³

Part one of this article will provide an overview of the Supreme Court's arm-of-the-state jurisprudence which is relevant to the issue of immunity for special purpose corporations, such as port authorities. Part two will delve into the specific factual background of the *Carnival* case. Part three will compare and contrast the approaches emanating from the First and Eleventh Circuits²⁴ in recent arm-of-the-state case

attachment due to its immunity under the FSIA "as an instrumentality of the People's Republic of China" *Id.* The district court found that the Chinese charterer was a subsidiary of its parent company. *Id.* at *3. Consequently, the charterer was not an instrumentality and its property was not protected from prejudgment attachment under the FSIA. *Id.* at *4.

²¹ Amicus Curiae Memorandum in Support of the Motion to Remand of the Puerto Rico Ports Authority, P.R. Ports Auth. v. Carnival Corp., 2008 WL 822349 (D. Puerto Rico) ("the arbitration award plainly violates Commonwealth law and public policies.").

²² *Id.*

²³ Hector G. Bladuelli, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 838 (2007) ("Although the Supreme Court has extended Eleventh Amendment immunity to a wide variety of [state created entities], no practical and uniform method exists for determining whether such an entity is entitled to it. Federal courts . . . have created different 'arm-of-the-state tests' to make the determination as to whether a particular entity should benefit from the state's immunity from suit.").

²⁴ I have chosen to evaluate the *Carnival* case under the approach employed by the First and Eleventh Circuits for a specific reason. Carnival originally filed its Petition for Confirmation of Arbitration Award in the United States District Court for the Southern District of Florida. *Carnival*, 2008 WL

decisions. This final portion of the paper will also examine a sister case, *Puerto Rico Ports Authority v. Federal Maritime Commission*,²⁵ which was decided by the D.C. Circuit in 2008 and in which a Petition of Certiorari has been filed.²⁶ The differing aspects of the various approaches employed by this sampling of the courts of appeals will then be applied to the facts of *Carnival* to illustrate that guidance from the Supreme Court is clearly needed in this important area of the law.

II. THE ARM-OF-THE-STATE DOCTRINE: THE CREATION OF A LABYRINTH

Whether a port authority will be entitled to Eleventh Amendment protection will be determined by the application of one facet of the law of sovereign immunity, the arm-of-the-state doctrine. That arm-of-the-state immunity has been characterized as being in a state of "disarray,"²⁷ and resulting from Supreme Court decisions which have produced "unwelcome complexity,"²⁸ is not surprising considering the entire body of jurisprudence surrounding the Eleventh Amendment.²⁹ Viewed as

4449957 at *1. PRPA responded by bringing a motion to dismiss for lack of personal jurisdiction, which is still pending before the Southern District of Florida. *Id.* After *Carnival* filed its Petition for Confirmation of Arbitration Award, PRPA filed its Petition to Vacate the Arbitration Award before the Commonwealth Court in San Juan. *Id.* *Carnival* then removed the state lawsuit to the Federal District Court for the District of Puerto Rico. *Id.* The district court in Puerto Rico has now stayed the action before it until the district court in Florida resolves the jurisdictional issue. *Id.* at *2. Consequently, if the district court in Florida, which falls within the Eleventh Circuit, finds it has proper jurisdiction, it will probably be called upon to rule on the sovereign immunity issue. If not, such a ruling would likely fall to the federal district court in Puerto Rico, which falls within the First Circuit. *See infra* notes 140-141.

²⁵ 531 F.3d 868 (D.C. Cir. 2008).

²⁶ 2008 WL 4525349 (U.S.), petition of cert. filed (U.S. Oct. 3, 2008).

²⁷ Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243 (1992).

²⁸ *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 883-84 (D.C. Cir. 2008) (Williams, J., concurring).

²⁹ U.S. Const. amend. XI. The Eleventh Amendment was ratified in 1789 in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that a citizen of South Carolina was entitled to recover from the State of Georgia an outstanding debt arising from the sale of Revolutionary War supplies even though the State had not consented to suit. For an excellent discussion of the *Chisholm* decision, see William A. Fletcher, *A Historical*

"one of the mysteries of legal evolution,"³⁰ the concept of Sovereign Immunity³¹ and the debate surrounding the proper scope of the states' immunity from suit has resulted in the Supreme Court blazing a jurisprudential path that can only be characterized as divisive.³²

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State"³³ The Court, however, has elected not to be bound by the specific text of the Amendment. Rather, finding that "the bare text of the Amendment is not an exhaustive description

Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1045-63 (1983).

³⁰ Angela S. Fetcher, Note, *Outdated, Confusing, and Unfair: A Glimpse at Sovereign Immunity in Kentucky*, 41 BRANDEIS L.J. 959, 960 (2003) (citing Stefan Schnopp, Note, *Garrett v. Sandusky: Justice Pfeifer's Fight for Full & Fair Legal Redress: Does Sovereign Immunity Violate Ohio's "Open Court" Provision*, 27 U. TOL. L. REV. 729, 732 (1996) (quoting Edwin M. Bourchard, *Governmental Liability in Tort*, 36 YALE L.J. 1,4 (1926)). See also Gregory Wicker, Comment, *Federal Maritime Commission v. South Carolina Ports Authority: Judicial Incursions Into Executive Power*, 69 BROOK. L. REV. 1555, 1559 (2004) (noting that "many commentators have described the Court's current state sovereignty jurisprudence as mystifying or suspicious") (citations omitted)).

³¹ The principle underlying sovereign immunity was that "the King could do no wrong." *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence [H]ence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power") (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-35(1765)).

³² See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (Breyer, J., Dissenting). In his dissent, Justice Breyer, joined by Justice Stevens, Justice Souter, and Justice Ginsberg, castigated the majority for endorsing an expanded view of sovereign immunity protection that "lacks any firm anchor in the Constitution's text", *Id.* at 777, and "reaffirm[ed] the need for continued dissent" from the path chosen by the majority. *Id.* at 788. See also Mark D. Falkoff, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 COLUM. L. REV. 853 (2001) (contending that the Supreme Court has expanded state immunity from suit by private individuals in a manner that "contravenes" the rule of law); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1561, 1564 (2002) (noting "[t]hese decisions have created an outcry in the academy").

³³ U.S. Const. amend. XI.

of the states' constitutional immunity from suit,"³⁴ the majority of the Court³⁵ has elected to employ an expansive interpretation of the language of the Eleventh Amendment to extend principles of federalism.³⁶ This sweeping jurisprudence³⁷ has also addressed the

³⁴ *Alden v. Maine*, 527 U.S. 706, 736 (1999) (Kennedy, J.); *see also* Sean M. Monahan, Note, *A Tempest in the Teapot: State Sovereign Immunity and Federal Administrative Adjudications in Federal Maritime Commission v. South Carolina State Ports Authority*, 88 CORNELL L. REV. 1794, 1796 ("the scope of the states' immunity from private suits reaches beyond the text of the Eleventh Amendment to encompass the "fundamental postulates implicit in the constitutional design." (quoting *Alden*, 527 U.S. at 729).

³⁵ The majority was generally composed of five Justices – Chief Justice Rehnquist, with Justices O'Connor, Scalia, Kennedy, and Thomas who consistently voted together to increase states' protection from "the effects of federal legislation aimed at regulating them." Professor Gordon G. Young, *Federal Maritime Commission v. South Carolina State Ports Authority: Small Iceberg or Just the Tip?*, 47 ST. LOUIS L. J. 971, 977 (2003); *see also*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Seth P. Waxman, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001).

³⁶ Christopher G. Paulraj, Note and Comment, *Federal Maritime Commission v. South Carolina State Ports Authority: Extending the States' Sovereign Immunity to Administrative Adjudications*, 55 ADMIN. L. REV. 679, 680 (2003) (commenting that the Court "has extended the principles of federalism to new heights, resulting in a drastic curtailment of the federal government's ability to regulate the states and their instrumentalities.") (citing Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 636 (2000) (noting that the "personnel change" on the Court "enabled the federal-enforcing side to gain ascendancy"))).

³⁷ *See, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002) (expanding sovereign immunity into the area of agency adjudication by holding that Eleventh Amendment immunity from suit is a valid defense in a privately initiated complaint case before a federal agency); *Bd. of Trs. of the Univ. of Ala. V. Garrett*, 531 U.S., 374 (2001) (ruling that the Americans with Disabilities Act improperly abrogated States' Eleventh Amendment immunity from suit); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (finding that irrespective of the Age Discrimination in Employment Act's clear statement of Congress' intent to abrogate states' immunity, such abrogation exceeded Congressional authority under the Fourteenth Amendment); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that Congress cannot subject a State to suit in its own state court without its consent); *Seminole Tribe of Fla. V. Florida*, 517 U.S. 44, 72 (1996) (establishing that Congress may not infringe upon a state's sovereignty in order to regulate commerce). *See generally*, Scott

issue of whether Eleventh Amendment Immunity from suit should extend to state instrumentalities or entities in cases where the state is not a named party in the action.³⁸ Irrespective of the fact that the Amendment appears to confer immunity only upon "one of the United States," Supreme Court jurisprudence has given birth to the "Arm-of-the-State" doctrine in order to support such an extension of the Eleventh Amendment shield from suit.³⁹

Prior to its creation of the arm-of-the-state doctrine, the Court followed a longstanding rule grounded in the fact that sovereign immunity is rooted in the doctrine of personal jurisdiction.⁴⁰ Under this approach, a state had the power to waive its own immunity or "to create separate legal persons that do not share the immunity."⁴¹ Consequently, sovereign immunity did "not extend to corporations that the sovereign (i.e., a state or the federal government) has created as separate legal persons."⁴² Under this approach, "the only jurisdictional inquiry necessary" to determine whether a state created entity such as the PRPA was entitled to sovereign immunity would have been "to examine the entity's organic structure and determine whether it was a corporation and a legal person capable of appearing in its own name."⁴³ If this rule was still in effect today, the outcome in the *Carnival* case would easily be determined. Under the laws of Puerto Rico, the Ports Authority is not only "given the power to sue and be sued, it was established as a "public corporation with a legal existence and

Fruehwald, *The Supreme Court's Confusing State Sovereign Immunity Jurisprudence*, 56 DRAKE L. REV. 253 (2008); Joseph M. Pellicciotti & Michael J. Pellicciotti, *Sovereign Immunity & Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court's Decade Long Decisional Trek, 1996-2006*, 59 BAYLOR L. REV. 623 (2007).

³⁸ *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions against one of the United States encompasses not only actions in which a state is actually named as the defendant, but also certain actions against state agents and instrumentalities.") (internal citations and quotations omitted).

³⁹ See Rogers, *supra* note 27 at 1245.

⁴⁰ *P. R. Ports Authority v. Fed. Mar. Comm'n*, 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring) (citing Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002)).

⁴¹ *Id.*

⁴² *Id.* at 882. See, e.g. *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890) (holding that county was amenable to suit despite the fact that it was an "integral part of the State" because it is also a corporation created by and with such powers as are given to it by the State")

⁴³ *Id.* at 883-84.

personality separate and apart from those of the Government [of Puerto Rico] and any officials thereof."⁴⁴ Clearly, the Ports Authority would not be entitled to immunity. The current legal landscape is not so simple.

The death knell for the bright-line approach began to toll in 1977 with the *Mt. Healthy* decision.⁴⁵ The entity at issue in *Mt. Healthy*, the Mt. Healthy City School District Board of Education (District Board), acknowledged that under state law, it was able to sue and be sued.⁴⁶ Despite this admission, the Court chose to ignore its prior rule that "a state's government corporation, with a general capacity of suing and being sued in their own names, were *ipso facto* completely bereft of sovereign immunity."⁴⁷ Instead, for the first time, the Court "implicitly extend[ed] its cautious rule" for a state to have waived its sovereign immunity "into the context of state government corporations, finding it unlikely that the state at issue "had consented to suit against its corporate offspring."⁴⁸

To balance the possible tension between the longstanding rule and the newly recognized extension of waiver into the context of government entities, the *Mt. Healthy* Court crafted a balancing test of "family resemblance"⁴⁹ which measured whether the Board was "more like a county or city than it is like an arm of the State."⁵⁰ In applying the test, the Court focused mainly upon four factors: the District Board's status or designation under state law;⁵¹ the degree of supervision the State Board of Education exercised over the District Board; the amount of funding the District Board received from the state; and the District Board's ability to generate its own revenue which might be used to satisfy a judgment rendered against the District

⁴⁴ *Id.* at 884 (citing P.R. LAWS ANN. tit. 23, § 333(b)).

⁴⁵ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. (1977). *Mt. Healthy* is also considered the start of the Court's "modern arm-of-the-state jurisprudence." *Fresenius Med. Care Cardiovascular Resources, Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 61 (1st Cir. 2003).

⁴⁶ *Puerto Rico Ports Authority*, 531 F.3d at 883 (citing OHIO REV. CODE § 3313.17, cited in Brief of Petitioners, *Mt. Healthy v. Doyle*, 1976 WL 181610, at *28 (1976)).

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting *Mt. Healthy*, 429 U.S. at 279-80).

⁴⁹ *Id.*

⁵⁰ *Mt. Healthy*, 429 U.S. at 280.

⁵¹ *Id.* at 280 (finding that under Ohio law, school districts were classified as political subdivisions).

Board.⁵² In holding that the District Board was a political subdivision, not an arm of the state,⁵³ the Court did provide a general approach to arm-of-the-state inquiries. It failed completely, however, to provide any guidance as to the comparative weight each factor of the balancing test should receive or whether there were additional criteria that could be considered when engaging in the new methodology.⁵⁴ With this oversight, the first path of the arm-of-the-state labyrinth had been trod.

Confusion concerning the viability of the *Mt. Healthy* balancing test was generated two years later when the Court ignored some previously utilized factors and employed additional variables in *Lake County Estates v. Tahoe Regional Planning Agency*.⁵⁵ The entity at issue in *Lake County*, the Tahoe Regional Planning Agency (TRPA), was the product of an interstate compact between California and Nevada.⁵⁶ In ruling that the TRPA was not entitled to Eleventh Amendment Immunity,⁵⁷ the Court based its ruling on six factors. As in *Mt. Healthy*, it still considered how the entity was designated under the relevant law⁵⁸ and whether it received funding from the state.⁵⁹ Also comparable to *Mt. Healthy*, the Court examined the level of state control, finding that the states had no power to veto the rules promulgated by the TRPA.⁶⁰ In contrast to *Mt. Healthy*, the issue of whether the entity could generate its own revenue was not addressed.⁶¹ The new factors consisted of: (1) examining the nature of the function of the entity: was it one normally performed by the state or local

⁵² *Id.* (finding that while the Ohio Board of Education did provide some guidance and funding to the school district, the districts had extensive powers to raise revenue by issuing bonds and levying taxes).

⁵³ *Id.* (finding that "on balance," the District Board "is more like a county or city" than an arm of the state).

⁵⁴ See Rogers, *supra* note 27, at 1263.

⁵⁵ 440 U.S. 391 (1979).

⁵⁶ *Id.* at 393-94. In order to conserve natural resources, the TRPA was created to coordinate and regulate development in the Lake Tahoe Basin. Such a bi-state entity is known as a Compact Clause entity. *Id.*

⁵⁷ *Id.* at 392 (concluding that the bi-state Compact had "created an agency comparable to a country or municipality").

⁵⁸ *Id.* at 402. (finding that the interstate compact described TRPA as a "separate legal entity" and a "political subdivision"); see *supra* note 51 and accompanying text.

⁵⁹ *Id.* (finding that counties and cities supplied TRPA's funding); see *supra* note 52 and accompanying text.

⁶⁰ *Id.*; see *supra* note 52 and accompanying text.

⁶¹ See *supra* note 52 and accompanying text.

governments;⁶² (2) examining state control on the basis of whether the majority of directors were appointed by the governor or counties and cities;⁶³ and (3) considering whether the entity's obligations would be binding on the state.⁶⁴ Once again, the Court failed to provide guidance as to how the new factors should be ranked in terms of weight or as to whether the new six factor test superseded the prior four-prong analysis of *Mt. Healthy*.⁶⁵

The unworkable nature of the multi-factored inquiry soon became evident as the lower courts struggled to apply the arm-of-the-state test. Certain courts did not view the list of factors set out in *Lake Country Estates* as "exclusive"⁶⁶ and expanded the universe of relevant criteria for the test,⁶⁷ while others gave different weight to the various factors to be considered.⁶⁸

The confusion of the lower courts was graphically illustrated when the Second and Third Circuits reached opposite conclusions as to whether a bi-state compact entity, the Port Authority of New York and New Jersey,⁶⁹ was entitled to Eleventh Amendment Immunity. Although both nominally employed the six-prong *Lake Country Estates* test, each applied its own recipe for the multifactor arm-of-the-state

⁶² *Lake Country Estates*, 440 U.S. at 402 (finding that TRPA's function, the regulation of land, was performed by local, not state, governments).

⁶³ *Id.* (finding that a greater percentage of the directors had been appointed by the county).

⁶⁴ *Id.* (under the compact, the obligations of TRPA were not binding on either state).

⁶⁵ See Rogers, *supra* note 27, at 1264.

⁶⁶ Port Auth. Police Benevolent Ass'n v. Port Auth., 819 F.2d 413, 417 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987) ("We do not read *Lake Country Estates* as setting out an exclusive list of factors to be considered.").

⁶⁷ See, e.g., Mitchell v. Los Angeles Cmty Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988) (adding the variable of whether the entity had the power to take property in its own name); Port Auth. Police Benevolent Ass'n, 819 F.2d at 417 (considering whether the entity had the power to sue and be sued and whether property belonging to the entity was immune from state taxation).

⁶⁸ See Bladuell, *supra* note 23, at 840. (citing Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 438-39 (5th Cir. 1985) (citing Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22, 25 (5th Cir. 1980) (holding that the treatment of the entity in state courts is the most important factor); Tuveson v. Fla. Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 732 (11th Cir. 1984) (citing Blake v. Kline, 612 F.2d 718, 723 (3d Cir. 1979) ("Several courts of appeals have regarded the final factor, who ultimately pays, as most crucial.")).

⁶⁹ *Feeney*, 495 U.S. at 301 (1990).

test.⁷⁰ The result was immunity from suit in the Third Circuit,⁷¹ but no Eleventh Amendment protection in the Second.⁷² This divergence between the appellate courts provided the perfect opportunity for the Court to explicate the arm-of-the-state doctrine. Unfortunately, when the Court first resolved the split between the Circuits, it did so without providing any guidance as to the proper application of its arm-of-the-state test.⁷³

Four years later, the Court again addressed the immunity of the Port Authority in *Hess v. Port Authority Trans-Hudson Corporation*.⁷⁴ The *Hess* Court set forth a two-step, arm-of-the-state analysis which was explicitly informed by the twin aims of the Eleventh Amendment – protection of the state’s treasury and protection of its dignity interests.⁷⁵ The first prong of the inquiry focused on the dignity interests of the state by seeking to determine if the state has sought to cloak a state entity with Eleventh Amendment Immunity. This was accomplished by examining various “indicators of immunity or the absence thereof” in the structure of the state designed entity.⁷⁶ In *Hess*, the key indicators considered were (1) the extent of state control through appointment of board members and the state’s veto power over board actions or its power to enlarge the entity’s responsibilities; (2) how the entity was characterized by the enabling and implementing legislation and how the entity had been viewed by state courts; (3) whether the entity performed functions that were normally performed by the state

⁷⁰ The Third Circuit gave greater weight to the fact that state courts had treated the Port Authority as a state agency that performed state functions. *Port Auth. Police Benevolent Ass’n*, 819 F.2d at 415. In contrast, the Second Circuit focused on the fact that neither New York nor New Jersey was liable for the debts of the entity. *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff’d*, 495 U.S. 299 (1990).

⁷¹ *Port Auth. Police Benevolent Ass’n*, 819 F.2d at 414.

⁷² *Feeney*, 873 F.2d 628, *aff’d*, 495 U.S. 299.

⁷³ *Feeney*, 495 U.S. at 305-09 (finding that because the lawsuit at issue was tantamount to a claim against the States, the States had waived the Port Authority’s potential Eleventh Amendment Immunity by effectively consenting to litigation).

⁷⁴ 513 U.S. 30, 47-48 (1994).

⁷⁵ *Id.* at 39-41. Even the dissent in *Hess* agreed that the initial question was whether “the State has structured the entity in the expectation that immunity will inhere.” *Id.* at 58 (O’Connor, J., dissenting).

⁷⁶ *Id.* at 44-46. Certain of the multi-factors previously relied upon in *Mt. Healthy* and *Lake Country Estates* were re-characterized in *Hess* as “indicators of immunity”. See *supra* notes 58-64 and accompanying text.

compared to those of local or non-governmental activities; and (4) whether the state was legally responsible for the debts of the entity.⁷⁷

If these indicators did not point in the same direction, then the second stage of the analysis came into play. At this point, the most salient consideration under a *Hess* Eleventh Amendment determination was the vulnerability of the state treasury.⁷⁸ Noting that the prevailing view among the circuits was that the "'state treasury criterion' - whether any judgment must be satisfied out of the state treasury - [was the] most important consideration in resolving Eleventh Amendment immunity issues,"⁷⁹ the Court found that the Port Authority was not entitled to immunity because neither New York nor New Jersey would, as a legal or practical matter, be liable for any judgment against the entity.⁸⁰

The emphasis placed by the *Hess* Court on the "practical" aspect of the state treasury risk factor as the linchpin for immunity was soon modified by its two most recent arm-of-the-state decisions relevant to the issue of immunity for port authorities.⁸¹ First, in *Regents of the*

⁷⁷ *Id.* at 44-46.

⁷⁸ *Id.* at 47-48 (concluding that the indicators of the arm-of-the-state analysis were ambiguous and shifting focus to protection of the state fisc). See C.M. Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1731-32 (1997) (criticizing the emphasis *Hess* places on the protection of the state treasury as the primary component of the arm-or-the-state analysis as inconsistent with broader Eleventh Amendment interests established by other and more recent cases).

⁷⁹ *Id.* at 51 (internal citation omitted).

⁸⁰ *Id.* at 52. The *Hess* Court supported its ruling by specifically recognizing the Port Authority as a "discrete entity created by constitutional compact among three sovereigns" which was "financially self-sufficient" and which "generate[d] its own revenues, and [paid] its own debts." Therefore, the Court reasoned that "[r]equiring the Port Authority to answer in federal court to injured railroad workers who assert a federal statutory right . . . to recover damages [did] not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment." *Id.* at 52. See also, Analisa Dillingham, *Reaching for Immunity: The third Circuit's Approach to the Extension of Eleventh Amendment Immunity to Instrumentalities as Arms of the State* In *Benn v. First Judicial District of Pennsylvania*, 51 VILL. L. REV. 999, 1004-1005 (2006).

⁸¹ Since *Hess*, the Court also decided *Auer v. Robbins*, 519 U.S. 452 (1997), briefly discussing the arm-of-the-state test in a footnote while holding that the Board of Police Commissioners was shielded by Eleventh Amendment immunity because the state was not responsible for the Board's financial liabilities and the only control the state exercised over the Board was the

University of California v. Doe,⁸² a unanimous Court departed from the “practical matter” focus, clarifying that the “relevant inquiry [was] not merely a ‘formalistic question of ultimate financial liability.’”⁸³ Rather, it was “the entity’s potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance,” that was germane to the arm-of-the-state inquiry.⁸⁴ Therefore, the fact that there was technically no risk to the treasury of California due to an indemnification agreement which protected the state from judgment against the University of California arising from its operation of a laboratory⁸⁵ did not suffice to divest the University of Eleventh Amendment immunity.⁸⁶

Then, in *Federal Maritime Commission v. South Carolina State Ports Authority*,⁸⁷ the apparent imbalance between the weight accorded by *Hess* to protection of the state fisc and a state’s dignity was apparently re-adjusted when the Court appeared to tip the scale in the opposite direction. Despite delineating the twin reasons underlying the Eleventh Amendment,⁸⁸ the *Hess* opinion had strongly endorsed the position maintained by the Courts of Appeals that “the vulnerability of the State’s purse [was] the most salient factor in Eleventh Amendment determinations.”⁸⁹ In *Federal Maritime Commission*, the Court was called upon to determine whether the South Carolina Ports Authority

appointment by the governor of four of the five Board members. *Id.* at 456 n.1. In 2006, the Court also clarified that the approach to analyzing the issue of sovereign immunity for a municipality or municipal corporation is the same for all cases even where the action is brought pursuant to the general maritime law. *N. Ins. Co. N.Y. v. Chatham County, Ga.*, 547 U.S. 189 (2006). *See generally*, Claiborne B. Smith, *Sovereign Immunity of Municipalities in Admiralty: A Look at Northern Insurance Co of New York v. Chatham County, Georgia*, 31 TUL. MAR. L. J. 689 (2007).

⁸² 519 U.S. 425 (1997). In *Doe*, the Court was called upon to determine whether the University of California, in its operation of a laboratory, was acting as an arm of the state. *Id.* at 429-32.

⁸³ *Benn v. First Jud. Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir. 2005) (citing *Doe*, 519 U.S. at 431).

⁸⁴ *Doe*, 519 U.S. at 431.

⁸⁵ *Id.* at 428-31.

⁸⁶ *Id.* at 431 (holding that “The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.”)

⁸⁷ 535 U.S. 743 (2002).

⁸⁸ *See supra* note 75 and accompanying text.

⁸⁹ *Hess*, 513 U.S. at 48. *See Bladuell, supra* note 23, at 842 (criticizing *Hess* for “ignor[ing] other legitimate Eleventh amendment interests” with its “nearly exclusive focus on the vulnerability of the state’s treasury”).

was an arm of the state able to claim sovereign immunity from suit before an administrative agency, the Federal Maritime Commission.⁹⁰ Declaring Eleventh Amendment protection now extended beyond actions brought by private parties in the courts to adjudications before federal agencies,⁹¹ the Court found that the Ports Authority was an arm of the state, and consequently, the agency was barred from hearing the suit.⁹² In so ruling, the Court emphasized that “the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”⁹³ In response to the argument that sovereign immunity should not apply to the agency proceedings because they do not present the same threat to the financial integrity of States as do private judicial suits,⁹⁴ the Court explained that “[w]hile state sovereign immunity serves the important function of shielding state treasuries . . . the doctrine’s central purpose is to accord the States the respect owed to them as joint sovereigns.”⁹⁵ The Court went so far as to note that even if the relief sought by a private party posed no threat to the state treasury, such as a cease – and – desist order, sovereign immunity would still bar the action. “[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.”⁹⁶

Unfortunately, the decisions in *Hess*, *Doe*, and *Federal Maritime Commission* have failed to bring significant uniformity to the lower court approaches to arm-of-the-state analysis.⁹⁷ In the wake of these precedents, it appears there is still a fair amount of contradiction among the lower courts concerning three basic issues. It is the differing answers to these questions which constitute the primary variations in

⁹⁰ *Fed. Mar. Comm’n*, 535 U.S. at 746-47.

⁹¹ *Id.* at 760.

⁹² *Id.* at 747 (ruling that the suit was barred by Eleventh Amendment sovereign immunity).

⁹³ *Id.* at 760.

⁹⁴ *Id.* at 765.

⁹⁵ *Id.* (internal citation and quotation omitted).

⁹⁶ *Id.* at 765-66 (quoting *Seminole Tribe of Fla. v. Fla.*, 512 U.S. 44, 58 (1996)) (Seminole tribe sued the state of Florida in federal court on the basis of the state’s refusal to negotiate in good faith regarding the inclusion of gaming activities in tribal-state gaming compact.).

⁹⁷ See Bladuell, *supra* note 23, at 842-47 (discussing aspects of the various methods employed among the circuits and the lack of uniformity after *Hess*); Dillingham, *supra* note 80, at 1012-26 (comparing the Third Circuit’s approach, which was modified after *Doe* and *Federal Maritime Commission*, to the Eleventh Amendment Immunity approach employed by other circuits).

application of the arm-of-the-state test resulting in the differing approaches employed by the circuit courts.

First, is the question of just how much weight should be accorded to the threat to the state treasury inquiry. In the aftermath of *Hess, Doe*, and *Federal Maritime Commission*, circuit responses have varied,⁹⁸ ranging from relegating the issue of “financial liability to the status of one factor co-equal with others in the immunity analysis”⁹⁹ to continuing to place dispositive importance on the vulnerability of the state’s purse when other indicators of immunity point in different directions.¹⁰⁰

⁹⁸ While some circuits have changed the order or weight of the indicators of immunity being considered, *see, e.g.*, *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68-69 (1st Cir. 2003) (reshaping its approach in the aftermath of *Hess and Doe*), others have found that no change was warranted. *See Bladuell, supra* note 23, at 844 (“The Third, Seventh, Eighth, and Ninth Circuits did not alter their arm-of-the-state test at all in response to *Hess*.”).

⁹⁹ *Benn v. First Jud. Dist. of Pa.*, 426 F.3d 233, 240 (3d Cir. 2005); *see also Bowers v. Nat’l Collegiate Athletics Ass’n*, 475 F.3d 524, 546 (3d Cir. 2007) (no longer ascribing primary importance to whether payment of judgment would come from the state).

¹⁰⁰ *See, e.g.*, *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 261 (4th Cir. 2005) (giving greatest weight to threat to the state treasury factor in its arm-of-the-state analysis); *Clissaras v. City of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (*per curiam*) (“The extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity” is the “most salient factor in Eleventh Amendment determinations.”); *S.J. v. Hamilton County*, 374 F.3d 416, 423 (6th Cir. 2004) (observing that values beyond guarding public fisc play a role in any arm-of-the-state analysis, but concluding that “[its] precedents and the Supreme Court’s case law still single out the factor of responsibility for a judgment as the most important (albeit not exclusive) determinant of arm-of-the-state status.”).

Some circuits have endorsed the position that the holding in *Federal Maritime Commission* “did not substantially modify the analytical framework established by *Hess*” at all. *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 241-42 (2d Cir. 2006) (“When the Supreme Court stated in [*Federal Maritime Commission*] that state sovereign immunity’s central purpose is to accord the States the respect owed them as joint sovereigns . . . it was merely reiterating a long-established and non-controversial principle. It was not stating a new rule of law or casting doubt on intervening precedents such as *Hess*.”). This argument has some merit. In *Federal Maritime Commission*, the Court was not determining whether an entity was entitled to Eleventh Amendment Immunity; it was simply considering “the consequences of such immunity” in a federal agency setting. *Brief for Intervenor, P.R. Ports Auth. v. Fed. Mar. Comm’n*, 2007 WL 2344792 at *15 (D.C. Cir. 2007).

A companion issue is whether the arm-of-the-state inquiry should focus on a state's *overall* responsibility for funding an entity or paying its debts or judgment or whether the question should be whether the state would be responsible legally to pay the judgment in the *specific* litigation at issue.¹⁰¹ Another facet of this question is whether a court should consider the ultimate impact an adverse judgment might have on its treasury even though the state is not legally liable for the judgment in the specific litigation. In seeking immunity, state created entities often argue that even if the state treasury is not legally responsible for a judgment against the entity, the practical ramifications of a multi-million dollar judgment may ultimately require the state to reallocate resources which would directly affect the state treasury.¹⁰² Currently, while one circuit may give little weight to such arguments,¹⁰³ another may take such “practical realities” threats to the state treasury into consideration in reaching its final ruling.¹⁰⁴

¹⁰¹ Compare *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 879-80 (D.C. Cir. 2008) (adopting the “overall” approach and thus focusing on whether the Commonwealth was legally liable for PRPA’s actions in any instance, irrespective of whether it would be liable for the particular Arbitration Award at issue in the case) with *Petition for a Writ of Certiorari, International Shipping Agency, Inc. v. P.R. Ports Auth.*, 2008 WL 4525349 at *16-17 (U.S.) (arguing that the D.C. Circuit’s “all or nothing” approach to analyzing the threat to the treasury factor ignores the clear intent of the Puerto Rico legislature which was “to create an entity that would act as an agent of the Commonwealth for some purposes (thus rendering the Commonwealth liable for damages), but would also act as an independent corporation . . . for other purposes (in which case the Commonwealth would not be liable for damages.)”).

¹⁰² See, e.g., Brief for Amicus Curiae Commonwealth of Puerto Rico in Support of Petitioner Puerto Rico Ports Authority, *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 2007 WL 2344794 at *15-16 (D.C. Cir.) (discussing indirect ramifications of potential orders and reparations on Commonwealth’s treasury).

¹⁰³ *Febres v. Camden Bd. of Educ.*, 445F.3d 227, 234-36 (3d Cir. 2006). In *Febres*, where the state was not legally required to pay any adverse judgment against the Board, the court rejected the Board’s argument that a judgment against it would have the practical effect of requiring state to replenish its funds, stating that while “the practical or indirect financial effects of a judgment may enter a court’s calculus” they “rarely have significant bearing on a determination of an entity’s status as an arm of the state.” A state’s legal liability (or lack thereof) for an entity’s debts merits far greater weight, and is therefore the key factor in our assessment of the state-treasury prong of the [arm-of-the-state] analysis. *Id.* at 236.

¹⁰⁴ *Manders v. Lee*, 338 F.3d 1304, 1327 (11th Cir. 2003) (where no Georgia law expressly required state to pay adverse judgment against Sheriff

Finally, in *Doe*, the Court specifically reserved the issue of “whether there may be some state instrumentalities that qualify as ‘arms-of-the-state’ for some purposes but not for others.”¹⁰⁵ As the lower courts have applied the ever more complex test of arm-of-the-state immunity, the question of whether the immunity status of an entity can change from case to case has become a fundamental difference in the approach taken by the circuits.¹⁰⁶

III. RELEVANT FACTUAL BACKGROUND SURROUNDING THE *CARNIVAL* LITIGATION

In *Puerto Rico Ports Authority v. Carnival Corporation*,¹⁰⁷ the U.S. District Court for Puerto Rico issued a rather short opinion and order staying an action to dismiss until the issue of personal jurisdiction was resolved in a lawsuit involving identical events previously filed in the Southern District of Florida.¹⁰⁸ While the opinion primarily focused on the more mundane aspects of the first-filed rule,¹⁰⁹ what is of interest about the case are the facts underlying Carnival Corporation’s

acting in his official capacity, the court emphasized that state funds would nevertheless be “implicated” because the Sheriff, who would have to pay the judgment out of the budget for the Sheriff’s Office and the “practical reality” was he would have to “recoup” the money for his depleted budget “from somewhere.”). Arguably, such reallocations not only affect the state’s purse, but also begin to infringe upon the state’s autonomy in making its own policy determinations and its dignity interests. See Bladuell, *supra* note 23, at 850 (“For example, if a . . . port authority is not entitled to immunity because of its traditional financial independence, a multimillion-dollar judgment against it would inevitably interfere with the state’s transportation affairs because money earmarked for financing operations or new development projects would have to be reallocated to satisfy the judgment.”).

¹⁰⁵ *Doe*, 519 U.S. at 428 n.2.

¹⁰⁶ Compare *P. R. Ports Auth.*, 531 F.3d at 873 (holding that “The status of an entity does not change from one case to the next based on . . . variable factors. Rather, once an entity is determined to be an arm of the state . . . that conclusion applies unless and until there are relevant changes in the state law governing the entity.”) with *Manders*, 338 F.3d at 1308 (stating that “[w]hether a defendant is an ‘arm of the State’ must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.”)

¹⁰⁷ 2008 WL 4449957 (D. Puerto Rico).

¹⁰⁸ *Id.* at *2.

¹⁰⁹ *Id.* at *1 (“The United States court of Appeals for the First Circuit has held that where the overlap between two lawsuits is nearly complete, the usual practice is for the court that first had jurisdiction to resolve the issues and the other court to defer.”).

(Carnival) motion to dismiss, PRPA’s opposition to such action, and the possible ramifications of the *Carnival* case for the confirmation of arbitral awards in cases involving port authorities.

First established in 1942 as the Puerto Rico Transportation Authority, the PRPA was created by Puerto Rico law as “a government instrumentality and public corporation with a legal existence and personality separate and apart from those of the Government and officials thereof.”¹¹⁰ According to the Enabling Act, its statutory purpose is to “develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services” in order to “promot[e] the general welfare and increas[e] commerce and prosperity of the Commonwealth.”¹¹¹ By statute, it performs governmental functions “including managing Puerto Rico’s ports . . . and regulating navigation in Puerto Rico’s harbors.”¹¹² “The first impression of Puerto Rico a tourist receives upon arrival to the island is that which arises from services provided by the authority.”¹¹³

Statutory law also provides that the PRPA be governed by a Board composed of five directors which are appointed by the Governor of the Commonwealth.¹¹⁴ Four of the five directors may be removed by the governor at will, the fifth may be removed for cause.¹¹⁵ An opinion by the Puerto Rico Attorney General also “previously opined that the Governor of Puerto Rico retains control of Puerto Rico’s public corporations.”¹¹⁶

The Commonwealth also exercises controls over the rule making power of the PRPA.¹¹⁷ The legislature can exercise its plenary authority over the PRPA by amending the enabling act¹¹⁸ or divest the PRPA of any one of its powers.¹¹⁹

¹¹⁰ P.R. Act No. 125 of 1942, § 3(b); P.R. Act No. 65 of 1989, § 3(b); 23 L.P.R.A. §333(a-b)(2004).

¹¹¹ 23 L.P.R.A. § 333(b).

¹¹² *P.R. Ports Auth. v. Fed. Mar. Comm’n*, 531 F.3d 868, 870 (D.C. Cir. 2008) (citing P.R. LAWS ANN. tit. 23, § 348 (a)).

¹¹³ P.R. Act No. 65 of 1989 at 271-72.

¹¹⁴ 23 L.P.R.A. § 334; *P.R. Ports Auth.*, 531 F.3d at 870.

¹¹⁵ *P.R. Ports Auth.*, 531 F.3d at 870.

¹¹⁶ *Id.* at 878 (citing 1992 Op. Atty. Gen. PR 103 (Sept. 21, 1992)).

¹¹⁷ 23 L.P.R.A. §§ 2109, 2205, and 2505-07.

¹¹⁸ *See, e.g.*, P.R. Act No. 65 of August 17, 1989.

¹¹⁹ *See Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 575-76 (1st Cir. 2004) (finding that Commonwealth legislature had transferred pilotage to new commission).

As a public corporation, however, the PRPA “can sue and be sued” and enter into contracts,¹²⁰ and its debts and funds are separate from those of the Commonwealth.¹²¹ In addition, PRPA “is not financed out of the Commonwealth’s general revenues.”¹²² Rather, it is primarily funded “through user fees and bonds.”¹²³ By law, however, the Commonwealth is responsible for paying certain judgments arising from lawsuits against the PRPA but only in specific instances. “In particular, the Dock and Harbor Act makes the Commonwealth directly liable for certain torts committed by PRPA’s officers, employees, or agents when they are acting in their official capacity and within the scope of their function, employment, or agency relationship.”¹²⁴

The controversy in *Carnival* can be traced back to an economic development project begun in 1996 when the Governor decided that the key to securing Puerto Rico’s economic future was an increase in tourism.¹²⁵ To achieve this end, the waterfront and harbor area of the Port of San Juan (Port) was redeveloped with a new convention center and cruise ship terminals replacing existing cargo operations.¹²⁶

On June 7, 2001, PRPA and Carnival entered into a Pier and Terminal Usage Agreement (Agreement) which provided for “the redevelopment and preferential use of a cruise ship terminal” known as “Pier 4” in the Port.¹²⁷ The Agreement further provided that all disputes would be submitted to arbitration in San Juan and that any arbitration would be “governed by, and construed and enforced in accordance with the laws of the Commonwealth of Puerto Rico, without giving effect to the choice of law provisions thereof.”¹²⁸

On August 3, 2004, Carnival filed a demand for arbitration claiming that PRPA had breached the Agreement by increasing the fees

¹²⁰ *P.R. Ports Auth.*, 531 F.3d at 879 (citing § 336(e-f)).

¹²¹ *Id.* (under Puerto Rico law, PRPA’s “debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings, and properties . . . shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico.”) (citing § 333(b)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 880 (citing § 2303).

¹²⁵ *Id.* at 871.

¹²⁶ *Id.*

¹²⁷ Reply Memorandum in Opposition to Carnival’s Motion to Dismiss, *P.R. Ports Auth. v. Carnival Corp.*, 2007 WL 4764459 (D. Puerto Rico).

¹²⁸ *Id.*

it charged Carnival by more than two percent during a twelve month period. According to Carnival, in return for its promise in 2001 to redevelop the cruiseship terminal, the PRPA not only agreed to reimburse Carnival for the costs of the redevelopment plus interest and granted Carnival a 20 year "preferential use" of Pier 4, the parties had also agreed that the PRPA was prohibited from increasing any rates levied on Carnival by more than two percent per year for 20 years.¹²⁹

The matter came before the International Center for Dispute Resolution, a division of the American Arbitration Association ("AAA") in July 2006¹³⁰ and on July 9, 2007, the AAA panel issued an award¹³¹ (Award) in San Juan in Carnival's favor.¹³² Eight days after receiving the Award, Carnival filed an action in the United States District Court for the Southern District of Florida seeking confirmation of the award.¹³³ In response, PRPA filed a motion to dismiss for lack of personal jurisdiction and also maintained that it was entitled to Eleventh Amendment immunity from suit in federal court.¹³⁴ PRPA also responded by filing a Petition to Vacate the Arbitration Award on September 27, 2007, in the Commonwealth Superior Court.¹³⁵ Carnival's reply was to remove the case to the Federal District court for the District of Puerto Rico and to simultaneously file a Motion to Dismiss predicated on the ground that the identical action was already pending before the district court in Florida.¹³⁶ Currently, the action is

¹²⁹ *Id.*

¹³⁰ P.R. Ports Auth. v. Carnival Corp., 2008 WL 4449957, *1 (D. Puerto Rico).

¹³¹ No. 50 181 T 00391 04 (July 9, 2007).

¹³² *Id.* According to the award, Carnival was to receive "an escrow account containing approximately ten million dollars in fees collected pursuant to the [PRPA's] Tariff" and the PRPA was "effectively enjoined . . . from collecting the full amounts of future fees" it was due "for providing services to Carnival vessels and passengers." In total, the award granted Carnival approximately \$61 million dollars in subsidies over 17 years. Reply Memorandum in Opposition to Carnival's Motion to Dismiss, P.R. Ports Auth. v. Carnival Corp., 2007 WL 4764459 (D. Puerto Rico).

¹³³ *Id.* (citing Civil No. 07-mc-21850 (DLG)). Under the Puerto Rico Arbitration Act, while "judicial confirmation is not required to perfect an award," a party "may file an action to confirm an arbitration award within one year of receiving an award." Reply Memorandum in Opposition to Carnival's Motion to Dismiss, P.R. Ports Auth. v. Carnival Corp., 2007 WL 4764459 (D. Puerto Rico) (citing Puerto Rico Arbitration Act § 3221).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

still pending in Florida and the proceedings have been stayed in Puerto Rico pending the resolution of the jurisdictional challenges before the southern District of Florida.¹³⁷

Clearly, the goal of PRPA is to have its Petition to Vacate the Award heard in a Commonwealth court.¹³⁸ The Commonwealth enjoys the same measure of sovereign immunity as a state.¹³⁹ So, in terms of litigation strategy, it appears that the PRPA is maintaining the position that because it is cloaked with Eleventh Amendment immunity from suit in federal court as an arm of the Commonwealth, any action to confirm or vacate the Arbitration Award must be brought in Commonwealth courts where the Award's violation of Commonwealth law and public policy should be easily determined. The key to the PRPA achieving its goal of forum selection is for the entity to convince the federal district court that it is entitled to the cloak of sovereign immunity. The pivotal move in winning the coveted protection of the Eleventh Amendment, however, may be in being able to control which district court will engage in the arm-of-the-state inquiry. Unfortunately for the PRPA, there is no uniform arm-of-the-state analysis employed by all federal courts. Therefore, whether the PRPA is found to be an arm of the Commonwealth may be entirely dependent on which federal

¹³⁷ *Id.* at *2.

¹³⁸ Pursuant to Puerto Rico's arbitration law, Commonwealth courts have jurisdiction over actions to confirm or vacate awards. 23 L.P.R.A. § 3221. For example, under the laws of the Commonwealth, Carnival would have had one year from the date the Award was issued to bring a motion to confirm in commonwealth court. *Id.* If the Motion to Vacate is ultimately heard in the Commonwealth Superior Court, it needs to be remembered that Carnival can respond to the Motion to Vacate and request Confirmation of the Award. Commonwealth arbitration law does appear to provide substantially the same rights as the Federal Arbitration Act. *See* 23 L.P.R.A. §§ 3201. However, there is always the proverbial risk for Carnival of running afoul of possible state court bias. The premise underlying diversity jurisdiction and removal stems from concerns of possible state prejudice against non-citizens. "The constitution has presumed (whether rightly or wrongly we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 345 (1816) (Story, J.).

¹³⁹ *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586-94 (1976); *see also* *P.R. Fed. Affairs Admin. V. Rodriguez*, 435 F.3d 378 (D.C. Cir 2006), *cert. denied*, 549 U.S. 812 (2006).

court ultimately hears the sovereign immunity issue due to the vagaries between the different approaches employed by the various circuits.

IV. A PERTINENT SAMPLING OF THE CIRCUITS: HOW WOULD *CARNIVAL* FARE?

The *Carnival* litigation is currently pending in the southern district of Florida. If the court finds that it has proper jurisdiction and the case goes forward, the court would employ the arm-of-the-state analysis crafted by the Eleventh Circuit Court of Appeals.¹⁴⁰ If, however, the Florida district court dismisses for lack of jurisdiction, it will fall to the Federal District Court of Puerto Rico to grapple with the sovereign immunity issue as it utilizes the arm-of-the-state inquiry propounded by the First Circuit.¹⁴¹

Under the Eleventh Circuit approach, to determine whether an entity is an arm-of-the-state in carrying out a particular function, a four factor analysis is employed: (1) how the entity is defined by state law;¹⁴² (2) the degree of control exercised by the state over the entity; (3) how the entity is funded; and (4) who bears responsibility for satisfying adverse judgments against the entity.¹⁴³ In terms of the weight to be given the risk to the state treasury factor, the Eleventh Circuit has stated that no single factor is dispositive, yet the source of the entity's funds and responsibility for satisfying judgments is of "considerable importance."¹⁴⁴ In addition, the court has noted that the

¹⁴⁰ The Eleventh Circuit hears cases from the federal district courts located in Alabama, Georgia & Florida. See Circuit Court Map available at <http://www.uscourts.gov/courtlinks> (last visited March 24, 2009).

¹⁴¹ The First Circuit hears cases from federal district courts located in Maine, Rhode Island, New Hampshire, Massachusetts, and Puerto Rico See Circuit Court Map available at <http://www.uscourts.gov/courtlinks> (last visited March 24, 2009).

¹⁴² The ultimate issue of whether an entity is an arm-of-the-state for eleventh Amendment purposes is a question of federal law. However, this question can only be answered "after considering provisions of state law." *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (citing *Doe*, 519 U.S. at 429 n.5 (noting that the Eleventh Amendment question "can be answered only after considering the provisions of state law that define the agency's character")); *Mt. Healthy*, 429 U.S. at 280 (stating that whether an entity is entitled to Eleventh Amendment immunity "depends, at least in part, upon the nature of the entity created by state law").

¹⁴³ *Id.*

¹⁴⁴ *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003) (quoting *Doe*, 519 U.S. at 430.). In *Vierling*, the Eleventh Circuit held

Supreme Court has never “required an actual drain on the state treasury as a per se condition of Eleventh Amendment immunity The State’s integrity is not limited to who foots the bill”¹⁴⁵ Further, The Eleventh Circuit has also given due consideration to the “practical reality” argument¹⁴⁶ that an adverse judgment against a state-created entity may threaten the state fisc even where the state has no legal responsibility to pay the judgment.¹⁴⁷ In *Manders v. Lee*, the court found an entity was entitled to immunity despite no legal liability because “a significant adverse judgment” would ultimately implicate state funds.¹⁴⁸

In contrast, the First Circuit specifically re-designed its approach to an arm-of-the-state inquiry in *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & The Caribbean Cardiovascular Center Corp.* in order to emulate the analysis of *Hess*.¹⁴⁹ It now employs a two-step analysis, with multiple factors instructive for each step. The first step inquires whether “the state [has] clearly structured the entity to share its sovereignty.”¹⁵⁰ If, however, “the factors assessed in analyzing the structure point in different directions,” under the second step, “the dispositive question concerns the risk that the damages will be paid from the public treasury This analysis focuses on whether the state has legally or practically obligated itself to pay the entity’s indebtedness.”¹⁵¹

In applying these standards in *Fresenius*, the court examined the structure of the entity by looking at its enabling act, how it was treated by other statutes, how the entity was viewed in state court decisions,

that the Port Everglades Port was not an arm of the state entitled to eleventh Amendment immunity. *Id.* at 1314. In so ruling, the court found that the Port Authority was characterized by state law “as an entity of the county, not the state;” that “the state had no control over the operation” of the Port facilities; and, most importantly, that “the Port Authority [was] a totally self-sufficient enterprise that receive[d] no financial support from the state” and which would be solely responsible for any adverse judgments against it. *Id.* at 1314-15.

¹⁴⁵ *Manders*, 338 F.3d at 1327 (internal citations omitted).

¹⁴⁶ See *supra* notes 103-106 and accompanying text.

¹⁴⁷ *Manders*, 338 F.3d at 1327.

¹⁴⁸ *Id.* at 1327-28 (“Sheriff Peterson . . . would have to pay any adverse federal court judgment against him in his official capacity out of the budget of the sheriff’s office. . . . If a significant adverse judgment occurs, . . . state funds are implicated because Sheriff Peterson would need to seek a greater total budget from . . . the State.”).

¹⁴⁹ 322 F.3d 56, 68 (1st Cir. 2003).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

the functions of the entity (whether they were governmental or proprietary), and the control exercised by the Commonwealth over the entity.¹⁵² Because the "indicia" did not "all point in the direction" of the corporation being an arm of the Commonwealth, the court went on to the second stage of the analysis and examined whether the Commonwealth's treasury would be responsible for paying any judgment against the entity.¹⁵³

The court first explained that if the state is not obligated legally or practically to bear and pay the indebtedness of an enterprise whose expenditures have exceeded its receipts, then "the Eleventh Amendment's core concern [protection of the state treasury] is not implicated."¹⁵⁴ The court then noted that it was clear based upon the enabling act that the Commonwealth was not liable for the debts of the entity.¹⁵⁵ It then went on to determine that the Commonwealth had not practically "assumed that obligation in fact, either directly or indirectly," by providing the operating funds needed by the entity for its operation.¹⁵⁶ It ended its analysis by rejecting the entity's "practical reality" argument, finding that simply because "a judgment would deplete its operating funds" and "that the Commonwealth might choose to rescue" the entity which "would indirectly deplete the state treasury" was insufficient for it receive Eleventh Amendment immunity.¹⁵⁷

As the comparison of the two approaches demonstrates, the major differences between the approaches employed by these two circuits are the weight accorded to the threat to treasury factor and the consideration given to "practical reality" threats to the treasury.¹⁵⁸

¹⁵² *Id.* at 68 – 72.

¹⁵³ *Id.* at 72.

¹⁵⁴ *Id.* (quoting *Hess*, 513 U.S. at 51).

¹⁵⁵ *Fresenius*, 322 F. 3d at 72.

¹⁵⁶ *Id.* at 72-75.

¹⁵⁷ *Id.* at 75.

¹⁵⁸ Both circuits seem to agree that an entity might be entitled to immunity in one circumstance but not in another depending upon the function in which it was engaged. See *supra* notes 107-108 and accompanying text. According to Eleventh Circuit precedent, whether an entity is an arm-of-the-state will be assessed in light of the particular function in which the entity was engaged. *Shands Teaching Hosp. & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) ("The pertinent inquiry is not into the nature of [an entity's] status in the abstract, but its function or role in a particular context."). Therefore, a state instrumentality might "qualify as an 'arm-of-the-state' for some purposes but not for others." In *Fresenius*, the First Circuit stated it was restructuring its arm-of-the-state analysis to comport with *Hess*. *Fresenius*, 322

While the Eleventh Circuit simply looks at the risk to the treasury as one of four factors to be considered, the First Circuit ultimately gives disproportionate weight to protecting the state fisc, the linchpin of step two of its analysis. Due to the numerous indicators of immunity the First Circuit examines to determine whether the entity has been structured to share in the state's sovereignty,¹⁵⁹ it is difficult to imagine that situations would frequently arise which would not require the court to move on to the second step two of its arm-of-the-state inquiry. Consequently, the First Circuit arm-of-the-state inquiry must frequently give disproportionate weight to the concern that the state treasury might be liable for any damages. It also appears clear that while the Eleventh Circuit has found "practical reality" arguments persuasive, the First Circuit gives little, if any, credence to such contentions.

These differences take on enormous importance when the facts surrounding the *Carnival* litigation are closely examined. Arguably, the "Achilles heel" of the PRPA's case for sovereign immunity is the threat to the state treasury factor under the enabling legislation, the PRPA has financial autonomy from the Commonwealth¹⁶⁰ and the Commonwealth is not legally responsible for the Arbitration Award¹⁶¹

F.3d at 69. *Hess*, however, did not address this issue. In fact, *Doe* which post-dates *Hess*, specifically left the issue open. *Doe*, 519 U.S. at 428 n.2. The logical conclusion is that *Fresenius* did not overrule or contradict prior First Circuit case law on this issue. Prior to its decision in *Fresenius*, the First Circuit had held that the PRPA was an arm of the state for some purposes, but not for others. *P.R. Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 10 (1st Cir. 1990) ("After examining the pertinent statutes, we conclude that whether the PRPA is entitled to eleventh amendment immunity protection depends upon the type of activity it engages in and the nature of the claim asserted against it."). See also *Royal Caribbean Corp v. P.R. Ports Auth.*, 973 F.2d .8, 9 (1st Cir. 1992) ("We must answer this question in respect to the particular 'type of activity' by the Ports Authority that is the object of the plaintiffs claims.").

¹⁵⁹ See *supra* note 149 and accompanying text. When applying the first step of its two-step test, the First Circuit evaluates the structure of the state created entity in light of the numerous and varied factors described in *Hess*, 513 U.S. at 44-46 (4 factors), *Lake County*, 440 U.S. at 401-402 (6 factors), and its prior decision, *Metcalf & Eddy Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 939-40 (1st Cir. 1993) (7 factors). *Fresenius*, 322 F. 3d at 62 nn. 5-6, 65 n.7, 68.

¹⁶⁰ See *supra* notes 121-123 and accompanying text.

¹⁶¹ *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 879 (D.C. Cir. 2008) ("under Puerto Rico law, PRPA's 'debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties . . . shall be deemed to be those of said government controlled

that orders "a \$61 million subsidy to Carnival while barring the [PRPA] from recovering its costs".¹⁶²

Despite this weakness, under the Eleventh Circuit's arm-of-the-state inquiry, the PRPA still might fare quite well. Application of both the first and second prongs of the Eleventh Circuit's four part analysis indicates that immunity might be in order. Under the first prong, which examines how the entity is defined by state law, it is relevant that the PRPA is defined as a "government instrumentality" which performs governmental functions.¹⁶³ In addition, the Commonwealth has filed an Amicus Curiae brief in *Carnival*, which states that the Commonwealth "specifically agrees with the [PRPA's] position that it is an arm or alter ego of the Commonwealth, and thus is entitled to share in the Commonwealth's sovereign immunity from suit in federal fora."¹⁶⁴

Although as a public corporation the PRPA can enter into contracts and sue and be sued,¹⁶⁵ the Commonwealth does maintain a fair degree of control over the entity through the Board of Directors and the plenary power of the legislature,¹⁶⁶ which is probably sufficient to satisfy the second prong of the inquiry.

Application of the third prong of the test, however, may militate against immunity. The facts surrounding *Carnival* establish that the debts and funds of the PRPA are separate from those of the Commonwealth¹⁶⁷ and that the entity does not receive funding from the Commonwealth.¹⁶⁸ Rather, the PRPA is financially independent, funding itself via "user fees and bonds."¹⁶⁹

It is quite possible, however, that the PRPA's claim of immunity may be saved by the final factor of who will be responsible for any judgments against the entity. If the court focuses only on the legal or

corporation, and not those of the Commonwealth of Puerto Rico." (citing P.R. LAWS ANN. tit. 23, §333(b) (1989)).

¹⁶² Amicus Curiae Memorandum in support of the Motion to Remand of the Puerto Rico Ports Authority, P.R. Ports Auth. v. Carnival Corp., 2008 WL 822349 (D. Puerto Rico).

¹⁶³ See *supra* notes 110-112 and accompanying text.

¹⁶⁴ Amicus Curiae Memorandum in support of the Motion to Remand of the Puerto Rico Ports Authority, P.R. Ports Auth. 2008 WL 822349.

¹⁶⁵ See *supra* note 120 and accompanying text.

¹⁶⁶ See *supra* notes 114 -119 and accompanying text.

¹⁶⁷ See *supra* note 121 and accompanying text.

¹⁶⁸ See *supra* note 122 and accompanying text.

¹⁶⁹ See *supra* note 123 and accompanying text.

practical responsibility for the judgment factor, the Commonwealth has no such duty vis-a-vis the Arbitration Award.¹⁷⁰ But the Eleventh Circuit has been known to also consider the “practical realities” of a judgment and to recognize that no “actual drain on the state treasury” is required for a finding of sovereign immunity “because the basic purpose of the Eleventh Amendment was to protect “the dignity and integrity of a state”¹⁷¹

In *Carnival*, the Commonwealth has maintained the position that the “practical reality” is “that the Commonwealth dictates the [PRPA’s] funding mechanism and expressly requires it to cover its expenses.”¹⁷² Further, the Commonwealth has asserted that any argument by Carnival “that the Commonwealth treasury will not have to satisfy any judgment ignores the practical reality of the Award’s impact on the [PRPA’s] funding source and, thereby, the disruption it causes the Commonwealth’s funding structure for the [PRPA].”¹⁷³ Therefore, there is a strong possibility that in balancing all factors, the Eleventh Circuit might find that the PRPA was entitled to wear the cloak of sovereign immunity.

Although the PRPA may have a chance of prevailing on its claim of sovereign immunity in the Eleventh Circuit, it is hard to contemplate such an outcome given the approach currently endorsed by the First Circuit.

As can be seen from the analysis of the facts of *Carnival* under the Eleventh Circuit’s approach to arm-of-the-state inquires, the indicators under the first step of the First Circuit’s two-part test would point in different directions.¹⁷⁴ Therefore, the court would turn to the

¹⁷⁰ P.R. Ports Auth. 531 F.3d at 879; see *supra* note 161 and accompanying text. It should be noted that the Arbitration Award did not order the PRPA to pay any monies to Carnival. Rather, it ordered approximately \$61 million dollars in subsidies over 17 years and barred the PRPA from recovering its costs.

¹⁷¹ Amicus Curiae Memorandum in support of the Motion to Remand of the Puerto Rico Ports Authority, P.R. Ports Auth. 2008 WL 822349 (quoting *Manders v. Lee*, 338 F.3d 1304, 1324-28 (11th Cir. 2003)).

¹⁷² “[I]n fulfilling its public responsibilities, the Enabling Act requires the [PRPA] to recover its costs and expenses through the establishment of fair and reasonable fees, rents and charges the users of the Port facilities and services.” *Id.* (citing 23 L.P.R.A. § 336(i) (1989)).

¹⁷³ *Id.*

¹⁷⁴ See *supra* notes 163-169 and accompanying text. Compare P.R. Ports Auth. 531 F. 3d at 870 (setting forth factors weighing in favor of immunity) with Petition for Writ of Certiorari, Int’l Shipping Agency, Inc. v.

question of whether there was any risk to the state treasury.¹⁷⁵ Because the First Circuit considers only legal or practical liability for a judgment to constitute a true threat to the state's purse¹⁷⁶ and has generally found little merit in arguments concerning "practical realities,"¹⁷⁷ and the Commonwealth has no legal liability for the Arbitration Award, it is unlikely that the First Circuit would find that the PRPA was entitled to Eleventh Amendment protection in the instant circumstances of *Carnival*.¹⁷⁸

A sampling of the arm-of-the-state tests of the various circuits which may impact the PRPA's assertion of Eleventh Amendment immunity would not be complete without examining the law of the D.C. Circuit. While the *Carnival* case would not come before this court, the D.C. Circuit recently ruled on the exact issue of sovereign immunity arising in *Carnival* in its 2008 decision, *Puerto Rico Ports Authority v. Federal Maritime Commission*.¹⁷⁹ Irrespective of the D.C. Circuit's position that its conclusion in *Puerto Rico Ports Authority* that the PRPA is entitled to sovereign immunity¹⁸⁰ can be reconciled with

P.R. Ports Auth., 2008 WL 4525349, at *11 (U.S.) (reviewing relevant statutes and First Circuit decisions regarding the status of the PRPA, which illustrate numerous factors weighing against immunity).

¹⁷⁵ See *supra* notes 150-151.

¹⁷⁶ See *supra* notes 154-156 and accompanying text.

¹⁷⁷ See *supra* note 157 and accompanying text.

¹⁷⁸ As previously mentioned, *Carnival* is currently pending in federal district court in Florida while the court considers the PRPA's motion to dismiss on the basis of lack of personal jurisdiction. See *supra* notes 133-134 and accompanying text. In light of the fact that it appears more problematic for the PRPA to prevail under the First Circuit's current approach to the arm-of-the-state doctrine than under that of the Eleventh Circuit, the question arises as to whether the entity was wise in bringing this jurisdictional challenge.

¹⁷⁹ 531 F.3d 868 (D.C. Cir. 2008). The dispute in *Puerto Rico Ports Authority* stemmed from the PRPA's "relocation of private marine terminal operators, as well as certain post-relocation practices and conditions at the new facilities." *Id.* at 871. Three marine terminal operators filed complaints with the Federal Maritime Commission, which alleged violations of the Shipping Act of 1984 and sought a cease-and-desist order and in excess of \$100 million in total damages. *Id.* By a vote of 3-2, the Federal Maritime Commission found that the PRPA did not qualify for immunity as an arm-of-the-state, and ruled that the regulatory adjudication of the privately filed complaint before the federal agency could proceed. *Id.* In *Puerto Rico Ports Authority*, the PRPA sought judicial review of the Commission's determination.

¹⁸⁰ *Id.* at 880 ("when considered all together, the three arm-of-the-state factors – intent, control, and overall effects on the treasury – lead us to

the First Circuit's ruling in *Fresenius*,¹⁸¹ the reality is that the court's interpretation of *Hess*¹⁸² has led it to fashion an analysis which is rather unique.

Under its three-factor test, the D.C. Circuit examines "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effect on the State treasury."¹⁸³ It is the court's adoption of the "all or nothing" approach to immunity, i.e., "once immune, always immune," which constitutes a significant departure from the approaches of other circuits.¹⁸⁴

In answering the question which the Supreme Court left open in *Doe*,¹⁸⁵ the *Puerto Rico Ports Authority* court maintained that "[t]he status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factor."¹⁸⁶ Therefore, "once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in state law governing the entity."¹⁸⁷

Given this "all or nothing approach" to sovereign immunity, it is only logical that the court would engage in an analysis which considered the *overall* threat to the state fisc, not the *specific* threat in

conclude that PRPA is an arm of the Commonwealth entitled to sovereign immunity.").

¹⁸¹ *Id.* at 881 n. 10 (The court distinguished the facts of *Puerto Rico Ports Authority* from those of *Fresenius* by noting that the enabling act in *Fresenius* "did not label the entity a government instrumentality", nor did the entity in *Fresenius* "perform governmental functions," nor were the entity's employees statutorily defined as "public employees," nor did the Governor "have the power to remove Board members.").

¹⁸² *Id.* at 874 ("In sum, *Hess* confirms that we must apply the three-factor arm-of-the-state test and look to state intent, state control, and overall effect on state treasury.").

¹⁸³ *Id.* at 873.

¹⁸⁴ See *supra* note 158. See also *DeGenova v. Sheriff of Dupage Cty.*, 209 F.3d 973, 975 (7th Cir. 2000)("[w]hether a sheriff acts for the state or a local entity is not an 'all or nothing' determination. Rather, the question is whether, when a sheriff acts in a particular area or on a particular issue, he acts for the State or a local entity.") (quoting *McMillan v. Monroe County, Ala.*, 520 U.S. 781, 785 (1997)).; *Petition for Writ of Certiorari, Int'l Shipping Agency, Inc.* 2008 WL 4525349, at *3 (U.S.).

¹⁸⁵ See *supra* note 105 and accompanying text.

¹⁸⁶ *P.R. Ports Auth.*, 531 F.3d at 873.

¹⁸⁷ *Id.*

the instant case. According to the court, the focus should be on the closeness of the overall relationship between the entity and the state to determine if the state is more than a mere “financial backstop” for the entity.¹⁸⁸ Although this approach appears to be unique to the D.C. Circuit,¹⁸⁹ for the court to have engaged in any other analysis would have contravened the entire premise underlying its “all or nothing” concept.

In applying step three of its three-factor test, the D.C. Circuit found a risk to the state’s purse despite concluding that the Commonwealth had no legal or practical liability for any judgment against the PRPA resulting from the actions brought by the marine terminal operators.¹⁹⁰ In examining the “overall effects on the Commonwealth’s treasury,”¹⁹¹ the court highlighted that under the Dock and Harbor Act, the Commonwealth was “directly liable for certain torts committed by PRPA’s officers, employees, or agents when they are acting in their official capacity and within the scope of their function, employment, or agency relationship.”¹⁹² Because the Commonwealth was “legally liable for some of PRPA’s actions” and “a substitute for PRPA . . . in certain cases” the D.C. Circuit held that it would be “factually incorrect” to suggest that the actions of the PRPA did “not affect the state treasury.”¹⁹³

V. CONCLUSION – CONFUSING OUTCOMES, UNPREDICTABILITY & A NEED FOR UNIFORMITY

As illustrated by the contingent outcomes in the *Carnival* litigation under the differing approaches of the Eleventh and First Circuits and the review of the *Puerto Rico Ports Authority* decision recently rendered by the D.C. Circuit, the current state of arm-of-the-state jurisprudence has become a labyrinth, rife with non-uniformity and clearly in need of clarification.¹⁹⁴ It is only through uniformity

¹⁸⁸ *Id.* at 880.

¹⁸⁹ Petition for Writ of Certiorari, *Int’l Shipping Agency, Inc.* 2008 WL 4525349, at *3 (U.S.).

¹⁹⁰ *P.R. Ports Auth.*, 531 F. 3d at 873.

¹⁹¹ *Id.*

¹⁹² *Id.* at 880.

¹⁹³ *Id.* at 879-880.

¹⁹⁴ See James G. Wilson, *The Eleventh Amendment Cases: Going Too Far with Judicial Neofederalism*, 33 LOY. L.A. L. REV. 1687, 1688 – 89 (2000) (“Eleventh Amendment doctrine contains . . . confusing outcomes that are even

that predictability in judgments may be achieved. Such uniformity is particularly desirable in cases involving state created entities, such as port authorities, who possess the autonomy to contract and to agree to the arbitration of disputes but who may fall within the protection of Eleventh Amendment immunity from a suit to enforce an Arbitration Award. Achieving uniformity in both the contours and application of the arm-of-the-state doctrine will assist private parties entering into agreements with such a state created entity in planning accordingly so that they may ensure that if there is a dispute between the parties, any arbitration award issued in their favor will be worth more than the paper on which it is printed.

Presently, a Petition for a Writ of Certiorari is pending before the Supreme Court in the *Puerto Rico Ports Authority* case.¹⁹⁵ This opinion serves as an excellent foil against which to compare and contrast the discrepancies between the various arm-of-the-state tests circulating among the courts of appeals. Thus, the stage is set for the Court to address the overall problems in this area of jurisprudence and provide much needed direction if it chooses to do so. It must be hoped the Court will not decline this opportunity to specifically address the questions raised by the different applications of the various approaches being employed by the circuit courts. Such clarification should enable the lower courts to uniformly engage in an integrated and holistic analysis of a state created entity's relationship with its maker to determine if the offspring is truly entitled to the sovereign immunity protection afforded to the King.

less comprehensible now that the doctrine has become so broad and dynamic.").

¹⁹⁵ Petition for Writ of Certiorari, *supra* note 189.